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No. 89-65

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FORT STEWART SCHOOLS,
Petitioner
v.
FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT FORT STEWART ASSOCIATION OF EDUCATORS IN OPPOSITION

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REASONS FOR DENYING THE PETITION

Review is not warranted because the court below correctly decided the issues presented here and because the issues are of relatively minor importance in light of the small number of federal employees impacted by this and other decisions concerning the right of federal employees to negotiate over wages.

1. The Eleventh Circuit's decision in *Fort Stewart Schools* will not have a significant impact because of the small number of teachers employed by the Army's Section 6 schools. There are only 187 teachers and teacher aides at Fort Stewart whose bargaining rights are affected. There

are 50 teachers at the West Point Elementary School who bargain collectively, 14 at Fort Rucker, 245 at Fort Bragg and 240 at Fort Knox. OFFICE OF PERSONNEL MANAGEMENT, UNION RECOGNITION IN THE FEDERAL GOVERNMENT, 155, 175, 198 (1987). The teachers at the other Section 6 schools administered by the Army at Fort Jackson, Fort Campbell, Fort Benning and Fort McClellan are not organized. There are also 110 teachers who bargain collectively with the Marine Corps, which administers a Section 6 school at Quantico, Virginia. UNION RECOGNITION at 291. The teachers who bargain collectively at the Section 6 schools administered by the Navy in Puerto Rico have not sought to negotiate over pay because 20 U.S.C. § 241(a) specifically provides that teachers employed at Section 6 schools outside the continental United States are to be paid the same as teachers in the District of Columbia public schools.

There are not "forty-odd" categories of federal employees whose salary is not fixed by statute and who will be able to negotiate over wages under the Federal Labor Relations Authority's decisions, such as the one enforced by the Eleventh Circuit. They are not "a large and diverse group" as the petitioner characterizes them but represent considerably less than 1% of the federal workforce.

The reference to "forty-odd pay systems which are not entirely fixed by statute" that appears in the Fort Stewart Schools' petition and in *Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), *reh'g en banc granted* (Feb. 6, 1989), is a citation to *American Federation of Government Employees and Department of the Air Force, Eglin Air Force Base*, 24 F.L.R.A. 377 (1986), in which Authority Chairman Calhoun apparently refers to a 1976 Staff Report of the President's Panel on Federal Compensation that identifies forty-three "administratively determined salary

schedules" and "wage schedules."[1] However, included on that list, which is reproduced in the appendix to this brief, are employees of agencies now defunct, such as the Energy Research and Development Administration and the Alaska Railroad. The list also includes employees of the Tennessee Valley Authority, the Central Intelligence Agency, the National Security Agency and the Federal Bureau of Investigation, which are excluded from coverage of the Federal Service Labor-Management Relations Statute by 5 U.S.C. § 7103(a)(3). Also included on this list are categories of supervisory or managerial employees who do not bargain under the FSLMR Statute,[2] along with numerous categories of temporary employees and those who would not constitute separate bargaining units.[3] Finally, the list also includes five categories of employees who are "prevailing rate employees." That is to say, they are employees whose pay is fixed by either the Prevailing Rate Act or a similar law that requires their employing agency to compensate them in accordance with the prevailing rate of wages paid to similar employees in the private sector.[4] Both courts that have considered

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[1] *See Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1417 n.15 (3rd Cir. 1988).

[2] Such as the chief examiners of the Board of Patent Appeals.

[3] Such as temporary census takers, noncitizen wage earners, student medical interns, Youth Employment Program workers and Justice Department special attorneys. The list also includes experts and consultants employed by individual personal service contracts who are covered by procurement laws instead of the FSLMR Statute.

[4] E.g., Panama Canal employees, 22 U.S.C. § 3655(b); the civilian staff at the Uniformed Services University of Health Services, 10 U.S.C. § 2113(f); Bureau of Printing and Engraving employees, 5 U.S.C. § 5349; maritime employees, 5 U.S.C. § 5348; and employees in the federal wage grade system, 5 U.S.C. chapter 53, subchapter IV. The Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. § 901 *et seq.*, requires the Secretary of Defense to set the "basic compensation" of teachers in DOD's overseas de-

the question have ruled that the salaries of prevailing rate employees are "matters [that] are specifically provided for by Federal statute" and are thus outside the duty to bargain under § 7103(a)(14)(c) of the FSLMR Statute, regardless of whether they would otherwise be a bargainable "condition of employment." *Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 838 F.2d 1341 (D.C. Cir. 1988); *Military Sealift Command*. The Federal Labor Relations Authority has now adopted that interpretation and has held that pay proposals made by prevailing rate employees are nonnegotiable, unless the employees are specifically covered by a "grandfather clause" in § 704 of the Civil Service Reform Act, which allows those prevailing rate employees who negotiated over wages before the enactment of the Prevailing Rate Act in 1972 to continue to do so. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591 (1988).

The Classification Act exempts only twenty-seven categories of employees and nine agencies from its coverage and thus provides a more reliable and current indication of the number of categories of employees whose pay is not fixed by statute. 5 U.S.C. § 5102. Most of the categories of employees excluded from the Classification Act, however, are either employed in an agency also excluded from the coverage of the FSLMR Statute by § 7103(a) or covered by some form of prevailing rate law or individualized pay statute.

In short, the numbers of federal employees whose pay is truly within administrative discretion and who have collective bargaining rights are few. In addition to teachers and staff in DOD dependents schools, the only other federal

pendents schools in accordance with the range of rates paid to teachers in stateside urban school districts. The issue of whether these teachers can negotiate over extra-duty and summer-school compensation is pending in *Department of Defense Dependents Schools*.

employees who are asserting bargaining rights on pay issues are those prevailing rate employees covered by the grandfather clause of § 704 (whose bargaining rights are not in dispute); a unit of 74 faculty members at the U.S. Merchant Marine Academy at Kings Point, New York;[5] six units totalling 1,141 employees of the Federal Deposit Insurance Corporation;[6] and a unit of approximately 2,190 employees of the Nuclear Regulatory Commission. UNION RECOGNITION at 393, 409, 434. However, the Court of Appeals for the Fourth Circuit recently held *en banc* that NRC employees may not negotiate over pay because, *inter alia*, the Atomic Energy Act, 42 U.S.C. § 2201(d), grants the Commission only limited authority to deviate from the Classification Act in setting pay rates. *Nuclear Regulatory Commission v. FLRA*, No. 87-3182 (4th Cir. July 14, 1989).

2. The court of appeals decided each of the three questions in this case correctly.

a. An examination of the language of the FSLMR Statute reveals that wages are a negotiable condition of employment unless they are specifically provided for by statute. Federal employees have the right "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102. "Conditions of employment" is in turn defined as:

> . . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise,

[5] The Maritime Education and Training Act of 1980 provides that the Secretary of Transportation may employ faculty at the academy without regard to the provisions of Title 5 and may pay faculty members "without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title (relating to classification and General Schedule pay rates)." 46 U.S.C. § 1295g(d).

[6] Congress has granted to the FDIC the power "to appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter, to define their duties [and] fix their compensation. . . ." 12 U.S.C. § 1819.

affecting working conditions, except that such term does not include policies, practices and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14). Nowhere is the right to negotiate wages excluded from the definition of "conditions of employment" unless the employee's wages "are specifically provided for by Federal statute." If Congress intended to exclude bargaining on wages under all circumstances, it could easily have included wages among these three exclusions or phrased exclusion (B) to read "relating to the *pay* and classification of any position."

It would be specious to suggest, as petitioner has, that "working conditions" are limited to the physical circumstances under which an employee performs his job, such as job safety and office environment. This would exclude the bulk of subject matters presently negotiated by federal sector unions, including personnel policies and practices involving equal employment opportunity, merit promotion, training and career development, work scheduling, discipline, and the negotiation of grievance and arbitration procedures made mandatory by § 7121(a)(1). If Congress had intended the definition of "conditions of employment" to be so limited, there would have been no need to exclude from the definition "political activity" and "position classification." How can it be said that pay is not a working condition but that position classification, from which pay flows for most federal employees, is?

An examination of the language of the National Labor Relations Act also demonstrates that an employee's pay is both a "working condition" and a "condition of em-

ployment" in common and Congressional parlance. In the third paragraph of Section 1 of the NLRA, "Findings and declaration of policy," 29 U.S.C. § 151, Congress specifically cites wages and hours as two of the working conditions over which collective bargaining should take place:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to *wages, hours or other working conditions* . . .

(emphasis supplied). In Section 9(a) of the NLRA, 29 U.S.C. § 159, Congress included rates of pay and wages as examples of the conditions of employment over which exclusive representatives had the right to bargain:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees in the unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment*: . . .

(emphasis supplied). The use by Congress of the words "or other" between "wages" and "working conditions" and between "rates of pay, wages" and "conditions of employment," rather than simply the word "or," demonstrates that Congress considered the latter term to encompass the former.[7]

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[7] In *Department of Defense Dependents Schools*, Judge Starr quoted the language of § 8(d) of the NLRA, 29 U.S.C. § 158(d), which requires both unions and employers to negotiate in good faith over "wages, hours and other terms and conditions of employment," and concluded, without reference to any authority, that

b. The origin of the phrase "personnel policies, practices and matters . . . affecting working conditions" in § 7103 is no mystery. It was adopted verbatim from the earlier Executive orders governing collective bargaining in the federal sector. The FLRA's predecessor, the Federal Labor Relations Council, held that wages were a negotiable working condition for employees whose compensation was not set by statute. The legislative history of the FSLMR Statute demonstrates that Congress's primary intent in enacting the statute was to codify the practices that arose under the Executive orders that had governed labor relations in the federal sector without any diminution in the scope of bargaining.

There is a long history of collective bargaining over wages in the federal sector. At least as early as 1949, Congress exempted skilled craftsmen and semiskilled manual laborers from the Classification Act, which set federal employees' pay. Pub. L. No. 429, ch. 782, § 201, 63 Stat. 954 (Oct. 28, 1949). The Bureau of Reclamation in the Department of Interior voluntarily bargained over wages for such employees with such unions as the IBEW since the late 1940s. *U.S. Department of Energy, Western Area Power Administration, Golden Colorado and IBEW Locals 640, et al.*, 22 F.L.R.A. 758, 802-803 (1986).

In 1961, President Kennedy appointed a task force, chaired by Secretary of Labor Arthur Goldberg, to formu-

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wages were a negotiable *term*, but not a *condition*, of employment. 863 F.2d at 991 n.3. This faulty analysis ignored the fact that wages are referred to only as a condition of employment in the following section of the NLRA, and the fact that § 8(d) was not added to the NLRA until the Taft-Hartley amendments of 1947, some fourteen years after the NLRA was originally enacted as the Wagner Act of 1933. Congress added § 8(d) in order to impose a mutual obligation to bargain in good faith on both employers and unions, where the Wagner Act imposed such a duty on the employer only. T. KHEEL, 4 LABOR LAW § 16.02[2] (1979). Section 8(d) did not change the scope or subject matter of bargaining in any way.

late recommendations on a governmentwide labor relations policy. The task force reported that numerous agencies had voluntarily recognized employee organizations and that the Tennessee Valley Authority and several components of the Department of Interior had developed "relationships that are close to full scale collective bargaining" with trade unions. PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE (1961) *reprinted in* House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel and Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute*, 1187 (1979). The task force's report noted that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because "[t]hese are established by law." *Id.* at 1200. The task force recommended a government-wide labor relations program that would permit bargaining over wages if not otherwise set by statute:

> Specific areas that might be included among subjects for consultation and collective negotiations include the work environment, supervisor employee relations, work shifts and tours of duty, grievance procedures, career development policies *and where permitted by law the implementation of policies relative to rates of pay and job classification.*

Id. at 1201 (emphasis added).

In a statement accompanying the published version of the task force report, President Kennedy directed that an Executive order be prepared to effectuate the task force's recommendations and noted "that where salaries and other conditions of employment are fixed by the Congress these matters are not subject to negotiation." *Id.* at 1178. Thus, those who developed the first government-wide labor relations program intended that "salaries" were to be

among the negotiable "conditions of employment" unless they were set by Congress.

Section 6(b) of Executive Order No. 10,988, 27 Fed. Reg. 551 (1962), *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 4269, 4271, issued by President Kennedy, authorized negotiations over "personnel policy and practices and matters affecting working conditions"—the same language that now appears in the FSLMR Statute at 5 U.S.C. § 7104(14). President Nixon revised the federal government's labor relations program by Executive Order No. 11,491, 43 Fed. Reg. 17605 (1969). Section 11 of this Executive order required agencies to negotiate "with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. . . ." Section 4 of Executive Order No. 11,491 established the Federal Labor Relations Council, comprised of the chairman of the Civil Service Commission, the Secretary of Labor, and an OMB official, and authorized it to resolve disputes governing the negotiability of collective bargaining proposals.

In 1972 the FLRC was called upon to resolve a negotiability dispute concerning the Department of Commerce's obligation to negotiate over a wage increase for professors at the Merchant Marine Academy. In *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972), the FLRC found that instructors at the academy were exempt from the Classification Act and that their salary proposals did not conflict with other federal law, as was alleged by the Department of Commerce. The FLRC specifically held that the two wage proposals at issue were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a) of the Order." 1 F.L.R.C. at 218. In another case, the FLRC held that several pay proposals made by another teachers' association were negotiable under Executive Order No. 11,491 because they did not conflict with the Overseas

Teachers Pay and Personnel Practices Act. *Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978).

The enactment of the FSLMR Statute in 1978 "constitute[d] a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 103 (1983). It is clear from the legislative history that Congress intended to expand, rather than constrict, the scope of bargaining that existed under the Executive orders. *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982); *New York Council, Association of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d Cir. 1985), *cert. denied*, 474 U.S. 846 (1988).[8]

The Senate Report stated that "[t]he scope of negotiations under this section is the same as under section 11(a) of Executive Order 11491." S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 2826. Representative Derwinski stated that Title VII was intended to codify the existing bargaining practices, which developed under the Executive orders:

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[8] During early debate, Representative William Ford termed the expansion in the scope of bargaining "a very modest, incremental step." 124 Cong. Rec. 25,777 (1978). In later debate he stated that "the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive] order." 124 Cong. Rec. 29,198 (1978). Representative Clay stated that in drafting Title VII of the Civil Service Reform Act, which became the FSLMR Statute, "the committee intended that the scope of bargaining under the act would be greater than that under the order as interpreted by the [Federal Labor Relations] Council." 124 Cong. Rec. 29,187 (1978). *See also* Supplemental Views to H.R. 11280, H.R. Rep. 95-1403, 95th Cong., 2d Sess. 377 (1978) (Title VII "broaden[s] the scope of bargaining beyond existing practices.").

> [T]he amendment is simply the administration's proposal for a flexible but orderly codification of the Executive orders which have successfully governed Federal labor-management relations since 1962. Four Presidents, two of each party, have managed to work with the guidelines embodied in this substitute, and now their successor has offered to codify the system into statutes which cannot, like Executive orders, be revoked by the White House at will.
>
> The substance of this amendment closely resembles the original program established by President Kennedy.

124 Cong. Rec. 29,188 (1978).

Thus, when it enacted the FSLMR Statute, Congress intended to preserve any and all collective bargaining rights that federal employees enjoyed under the Executive orders—including, in limited circumstances, the right to bargain over wages. When referring to the right of prevailing rate employees to negotiate over wages, Representative Ford stated, "we should not now be narrowing the preexisting collective bargaining rights of *any group* of Federal employees." 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (emphasis added). Congress is generally presumed to be knowledgeable about existing law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, (1988). When Congress adopts a new law incorporating sections of a prior law, Congress is presumed to know both the judicial and administrative interpretations of the incorporated law. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). When Congress codified without change language contained in Executive Order 11,491, it knew of and did not intend a change in the judicial and executive interpretation of that language. *Florida National Guard v. FLRA*, 699 F.2d 1082, 1087 (11th Cir. 1983); *United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981). "One such existing practice allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish

wages and fringe benefits." *Fort Stewart Schools*, 860 F.2d at 402 (citing *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972) and *OEA and DODDS*, 6 F.L.R.C. 231 (1978)).

The petitioner has cited and analyzed the legislative history of the FSLMR Statute out of context. Although the Senate report does state that Title VII "excludes bargaining on economic matters," in the paragraphs immediately preceding that statement the Senate report makes clear that any collective bargaining rights that existed under Executive Order 11,491 were to be preserved by the new law:

> S. 2640 incorporates into law the existing Federal employee relations program. . . .
>
> The basic, well-tested provisions, policies and approaches of Executive Order 11491, as amended, have provided a sound and balanced basis for cooperative and constructive relationships between labor organizations and management officials. Supplemented by the Federal Labor Relations Authority to administer the program, and expanded arbitration procedures for resolving individual appeals, these measures will promote effective labor-management relationships in Federal agencies.

Senate report, *id.*, at 12. Immediately preceding Representative Udall's statement that "we do not permit bargaining over pay," Mr. Udall also states that the statute "gives Federal employees greater rights in labor relations than they have heretofore enjoyed." 124 Cong. Rec. 25,716 (1978). Similarly, although Representative Clay stated that "employees still . . . cannot bargain[] over pay," he also stated immediately afterward that the statute adopted a position that "moves slightly beyond" existing bargaining practices. 124 Cong. Rec. 24,286 (1978). Although Senator Sasser stated that "Federal employees may not bargain over pay or fringe benefits," he was de-

scribing, however mistakenly, the practice under Executive Order 11,491, *not* the new FSLMR Statute.[9]

When the legislative history is read in both its immediate and historical context, it is clear that the statements were merely assurances that, as a general rule, wages would continue to be nonnegotiable for the overwhelming majority of federal employees whose pay is set by statute. For example, Representative Ford stated that "no matters that are governed by statute (such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement." 124 Cong. Rec. 25,777 (1978). Representative Udall stated that "[t]here is not really any argument in this bill or in this title about federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through Congressional action." 124 Cong. Rec. 29,182 (1978). The court of appeals correctly concluded that:

> A close examination of the Congressional reports and debates reveals that the FSLMRA's supporters made these statements with the understanding that Congress generally regulates such matters through its prevailing rate acts, not with the understanding that the FSLMRA barred all wage negotiations. . . . Thus, although some legislators' remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRA would not supplant specific laws which set wages and benefits.

Fort Stewart Schools, 860 F.2d at 401.

On the other hand, the legislative history reaffirms the principle, recognized as early as 1961 by the Goldberg task force, that any matters that are not specifically provided for by statute are negotiable. Representative Clay stated during debate:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the Committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong. Rec. 29,187 (1978).

c. The fact that Congress specifically authorized certain prevailing rate employees to negotiate over pay in § 704 of the Civil Service Reform Act of 1978, 5 U.S.C. § 5343 note, does not indicate an intention to foreclose other employees from bargaining over pay. The Prevailing Rate Act, 5 U.S.C. § 5343, provides that the salaries of certain skilled craftsmen "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates" paid to similar crafts in the private sector. As noted earlier, before the Prevailing Rate Act was enacted in 1972, many of the skilled craftsmen now covered by the Act negotiated over wages. Section 9(b) of the act, Pub. L. No. 92-392, permitted those employees covered by the Prevailing Rate Act who negotiated over pay prior to its

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[9] In context, the quote from Senator Sasser reads:

> Currently, Federal labor relations are governed by Executive Order 11491, as amended. The Executive order establishes the right of Federal employees to belong to unions and establishes procedures for the recognition of bargaining units. But the Federal labor relations program continues to differ in substantive ways from that of the private sector.
>
> For one, Federal employees are not allowed to strike. Also, exclusive representatives of Federal employees may not bargain over pay or fringe benefits.

124 Cong. Rec. 27,549 (1978).

enactment to continue to do so. 5 U.S.C. § 5343 note. When Congress enacted the Civil Service Reform Act of 1978 it provided in § 704 that those employees who continued wage negotiations pursuant to § 9(b) could continue to do so notwithstanding the Prevailing Rate Act, the premium pay provisions of Title 5 and any contrary provision of the FSLMR Statute.[10] But not for this "grandfather" clause, these prevailing rate employees would no longer be able to negotiate over wages under the FSLMR Statute because their pay would be a matter "specifically provided for by Federal statute," 5 U.S.C. § 7103(a)(14)(c), namely the Prevailing Rate Act. Indeed, the FLRA has held that other Prevailing Rate Act employees who did not bargain over wages prior to 1972 are now foreclosed from doing so for this reason. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591, 597, 600 (1988). Thus, § 704 was needed as an exception to the general rule that employees whose salaries are set by statute may not negotiate over wages; it has no bearing on the bargaining rights of those employees who are not subject to a pay-fixing statute.

Section 704 was also enacted to specifically overrule the effect of two Comptroller General decisions affecting Prevailing Rate Act employees, and cannot therefore be taken as an indication of a desire by Congress to limit, by omission, the bargaining rights of other employees. In those decisions, the Comptroller General held that although § 9(b) exempted employees in certain bargaining units from the Prevailing Rate Act, the overtime provisions of 5 U.S.C. §§ 5541-5550 were still applicable and

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[10] There are twenty bargaining units of Prevailing Rate Act wage grade employees represented by craft unions, such as the International Brotherhood of Electrical Workers and the Columbia Power Trades Council, that gained recognition before 1972 and are thus grandfathered by § 704. UNION RECOGNITION at 331-332, 351-362, 390.

beyond the scope of bargaining. During debate, Congressman Ford stated:

> During committee mark-up, I offered an amendment to add a new provision, section 704(c), which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees . . . This provision is required because of two recent rulings by the Comptroller General which invalidated certain collectively bargained provisions and held that specific legislative authorization is necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice. Decisions Nos. B-189782 (February 3, 1978) and B-191520 (June 6, 1978).

124 Cong. Rec. 25722 (1978). *See also* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 159 (1978). Thus, § 704 was added to overcome a roadblock to the bargaining rights of particular employees rather than as an exhaustive list of those employees who could negotiate over pay issues.

d. If Congress intended employees such as dependents school teachers to continue to negotiate over wages, it would not have intended a construction of § 7106(a)(1) that would foreclose such bargaining. In any case, § 7106(a)(1) grants management the right to "determine" its budget. Proposals that merely have an economic cost without being budget determinative are negotiable. Virtually any collective bargaining proposal has some cost and impacts an agency's budget, including arbitration procedures and negotiations themselves.

The Army has no support for its argument that whether the union's proposals would significantly increase costs should be tested "by comparison with the costs of the program employing the bargaining unit employees, not the entire agency budget." The plain language of the statute is to the contrary. Section 7106(a) states that "nothing in this chapter shall affect the authority of any

management official of any agency—to determine the . . . budget . . . *of the agency.*" (emphasis added). "Agency" is defined by the statute as "an Executive agency." 5 U.S.C. § 7103(a)(3). For the purposes of title 5, "Executive agency" means an Executive Department, a Government corporation and an independent establishment. 5 U.S.C. § 105. The Department of Defense is an Executive Department and thus an Executive agency; the Fort Stewart school system is not. 5 U.S.C. § 101.

The union's proposals do not entail an unavoidable increase in costs, even if judged on a schoolwide basis. First, presumably the salaries of the teachers in the Georgia public schools are raised annually. Therefore, at least part of the 13.5% salary increase sought was going to be incurred by the agency anyway because the Army pegs Fort Stewart teachers' salaries to those paid in local school districts. Second, higher salaries attract better, harder-working teachers, which would in turn permit the Fort Stewart schools to increase the pupil-teacher ratio slightly without any detriment to the overall quality and total cost for salaries at Fort Stewart. As an alternative, other aspects of the Fort Stewart schools' administrative program could be cut, such as support staff and administrator salaries. And, of course, if the Fort Stewart schools lack financial ability to pay a 13.5% teacher salary increase within the Army's budget authority without adversely impacting its educational program, it should refuse to agree to the proposal and make its arguments to the Federal Service Impasses Panel pursuant to 5 U.S.C. § 7119(b). Budget and financial constraints of a public sector employer are precisely the kinds of factors considered in interest arbitration and impasse resolution. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 832-835 (4th ed. 1985).

e. Whether the Army has a compelling need for Army Reg. 352-3, 1-7, so as to preclude negotiations over proposals that conflict with the regulation's terms, certainly

is not a question warranting review by this Court. This issue only impacts the 736 teachers who bargain at five Army bases.

Proposals that conflict with an agency regulation are negotiable unless the agency demonstrates a "compelling need" for adherence to the regulation. 5 U.S.C. § 7117(a)(2). In order to demonstrate a "compelling need" the Army must demonstrate that either:

> The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or execution of functions of the agency . . .
>
> [or] the rule or regulation implements a mandate to the agency . . . under law . . . which implementation is essentially nondiscretionary in nature.

5 C.F.R. § 2424.11(a), (c).

Although § 241(a) requires education at the Fort Stewart schools to be comparable to that in local public schools, it does not require that salaries paid to teachers be the same. The Army has not even demonstrated that this regulation is helpful, no less essential, to ensuring that the education provided to students on base is comparable to education off base. "Comparability" of education is intangible. It cannot be measured simply by comparing teachers' salaries or even per-pupil teacher expenditures. There is no proof that modest salary increases will do anything but improve education at Fort Stewart by improving morale and the retention rate of experienced teachers. Congress enacted Section 6 out of concern for the welfare of military dependents, not local school districts.[11] While the Army must provide an edu-

[11] The Section 6 schools were originally created because the public schools in neighboring communities were racially segregated. *Hearings pursuant to H. Res. 115 before the Special Subcomm. of the House Comm. on Education and Labor*, 83rd Cong., 1st Sess., 127-130 (1953) (statement of Rall Grigsby, Acting Commissioner of Education). Authority to operate schools on military bases

cation that is comparable, nothing prohibits it from providing a better education than the local school districts do. Any other reading of § 241 would be absurd because no purpose would be served by it. Would the Army be in violation of § 241 if the students at Fort Stewart got higher standardized test scores, got into better colleges, read better, wrote better and spelled better than students in local public schools?

Nor has the Army demonstrated how its regulation is essential to carrying out § 241(e). That subsection only requires equal per-pupil costs "to the maximum extent practicable." Assuming that it is not practicable to offset the increased cost of teachers' salaries by other economies in the schools' overall program (and certainly economies can be found in any government program), the Army may exceed per-pupil costs without offending § 241(e) because it is not "practicable" to equalize them *and* meet the bargaining obligations imposed upon the Army by the FSLMR Statute at the same time. Both Section 6 and the FSLMR Statute are acts of Congress advancing important social welfare goals, and both are equally important. The Army's obligations under one law must be balanced with its obligations under the other. Under the FSLMR Statute the Army *must* bargain over conditions of employment, but under § 241(e) the Army must equalize per-pupil expenditures only if it is "practicable" to do so.

Even assuming that the Army has no discretion to exceed equal per-pupil costs, the Army has not even disclosed how the per-pupil expenditures at Fort Stewart presently compares with such expenditures at Georgia public schools. Nor has the Army demonstrated that teach-

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within the United States was expanded by the Civil Rights Act of 1960, Pub. L. No. 86-449, Title V, § 501, 74 Stat. 909 (1960) because local school authorities near military bases had closed public schools in an attempt to defy desegregation orders. 1960 U.S. CODE CONG. & AD. NEWS 1946, 1950.

ers in local public schools are given a smaller annual salary increase than that sought herein.[12] Assuming that salaries at Fort Stewart and the Georgia public schools are presently comparable, other significant portions of the teachers' total compensation package are already unequal. Teachers at Fort Stewart who were employed prior to December 31, 1983, are covered by the Federal Civil Service Retirement System, 5 U.S.C. § 8301 *et seq.* The Army contributes 7% of each employee's basic pay to the Civil Service Retirement Fund and nothing to the Social Security Fund. Georgia school districts contribute 13.43% of each teacher's salary rate to the Teacher Retirement System of Georgia, GA. ANN. CODE § 47-3-1 *et seq.*, plus 7.51% to the Social Security Fund. Assuming salaries are currently equal, the Army must immediately raise the salary of teachers employed prior to 1984 13.94% to have the total compensation costs for those teachers equal the costs for similar teachers in Georgia public schools. Fort Stewart teachers are covered by different health insurance programs (compare 5 U.S.C. § 9801 *et seq.* with GA. CODE ANN. § 20-2-880 *et seq.*) as well as different life insurance and disability programs. The claim that compensation costs are and must remain equal is a myth.

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[12] The proposal for an annual 13.5% raise is not the only one at issue. Other proposals would require the Army to use certain specified procedures in surveying the salaries paid to teachers in local school districts, would require that the number of pay steps corresponding to the number of years of experience be increased from 16 to 20, and concern other fringe benefits. The Army has not explained how these proposals conflict with pay practices in local school districts.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

INVENTORY OF FEDERAL PAY SYSTEMS

STATUTORY PAY SCHEDULES

General Schedule (Title 5, United States Code, chapter 51 and subchapter III of chapter 53)		[1] 1,412,169
Foreign Service (Title 22, USC, chapters 14 and 14A)		13,950
Career Ambassadors, Career Ministers, and Chiefs of Missions	123	
Foreign Service Officers	3,278	
Foreign Service Reserve	5,816	
Foreign Service Staff	3,806	
Foreign Service Information Officers	927	
Department of Medicine and Surgery, Veterans Administration (Title 38, USC, chapter 73)		26,658
Physicians and Dentists	4,920	
Nurses	21,738	
Administrative Personnel	[2]	
Executive Schedule (5 USC, subchapter II of chapter 53)		[3] 378
Commissioned Personnel, Public Health Service and National Oceanic and Atmospheric Administration (Title 37, USC)		5,485
Executive Protective Service (3 USC 204)		[4] 850
United States Park Police (Title 4, District of Columbia Code, 833)		514
Police, National Zoological Park (5 USC 5365)		[5] 30

ADMINISTRATIVE DETERMINED SALARY SCHEDULES

United States Postal Service (Title 39, USC)		718,502
Postal Service	577,589	
Rural Carriers	58,038	

See footnote at end of table.

Postal Management	47,846	
Postal Executive	29,502	
Fourth-Class Postmasters	5,332	
Postal Service Temporary Rate	107	
Postal Service Officer	88	
Similar to the General Schedule		
Energy Research and Development Administration (Atomic Energy Act of 1954, Sec. 161d; and Energy Reorganization Act of 1974)		[4]7,105
Nuclear Regulatory Commission (Atomic Energy Act of 1954, Sec. 161d; and Energy Reorganization Act of 1974)		[4]1,016
National Security Agency (Pub. L. 86-36, Sec. 2)		[2]
Central Intelligence Agency (50 USC 403g)		[2]
Panama Canal Zone (Title 2, Canal Zone Code, 143 and 144)		2,893
Federal Deposit Insurance Corp. (12 USC 1819)		[6]2,292
Federal Reserve System (Federal Reserve Act of 1913, as amended)		[6]1,046
National Science Foundation (42 USC 1873(a))		[6]292
Youth Employment Programs (Schedule A, Sec. 213.3102(v) and (w))		20, 789
Tennessee Valley Authority, Salary Policy Employees (Tennessee Valley Authority, Act of 1933, as amended)		[6]9,523
Clerical	2,255	
Engineering and Scientific	2,281	
Aide and Technician	2,070	
Management	1,871	
Administrative	519	
Custodial	286	
Public Safety	241	

See footnote at end of table.

Noncitizens in nonwage positions (Various authorities, including treaties and other agreements)		[6]19,335
Census temporary positions (13 USC 23 and 24)		[2]
Experts and Consultants (5 USC 3109)		10,889
Teachers, Department of Defense		[5]9,107
Overseas dependents schools (20 USC ch. 25)	7,357	
Domestic dependents schools (20 USC 241(a))	1,750	
United States Attorneys and Assistant U.S. Attorneys (28 USC 548)		[2]1,550
Special Attorneys, Department of Justice (28 USC 515)		[2]
Scientific and Professional (5 USC 3104 and similar authorities)		618
Faculty at Service Academies		[4]701
Naval Academy, Naval War College and Naval Postgraduate School (10 USC 7478, 7044, 7043, 6952)	570	
Merchant Marine Academy (46 USC ch. 31)	90	
Coast Guard Academy (14 USC 186(b))	41	
Civilian members of faculty and staff, Uniformed Services University of the Health Sciences, Department of Defense (10 USC 2213(f))		[2]
Canteen Service, Veterans Administration (38 USC 4202)		2,174
Foreign Compensation (Pub. L. 87-195, Sec. 625(d))		173
Foreign Defense (Pub. L. 87-195, Sec. 625(d))		15
Panama Canal Zone Special Category (2 Canal Zone Code 143 and 144)		1,317
Agricultural Marketing (7 USC 1627)		845

See footnote at end of table.

Alaska Railroad (43 USC 975)	[5] 120
National Bank Examiners, Department of Treasury (12 USC, ch. 1, and 5 USC 5102 (c)(14))	[2]
Board of Patent Appeals (35 USC 3 and 7)	[2]
Foreign Service Institute (22 USC 1044)	[2]
United Nations Participation (State Dept.) (Pub. L. 79-264)	[2]
Student Medical Interns (5 USC 5352 and 38 USC 4114)	[2]
Administrative Schedule, Agency for International Development (Pub. L. 87-195, Sec. 625(b))	[2]
Consular Agents (22 USC 861(6), 873, and 890)	[2]
Staff, Offices of Former Presidents (Pub. L. 85-745)	[2]
Smithsonian Institution (20 USC 74(c))	[2]

III. ADMINISTRATIVELY DETERMINED WAGE SCHEDULES

Federal Wage System (5 USC, subchapter IV of chapter 53)		470,558
Regular Schedule	438,886	
Nonsupervisory	(383,036)	
Leader	(14,371)	
Supervisory	(41,479)	
Production Facilitating	7,554	
Printing and Lithographic	4,887	
Other Special Schedules	25,210	
Tennessee Valley Authority, trades and labor employees (Tennessee Valley Authority Act of 1933, as amended)		14,842
Panama Canal Zone, wage employees (2 Canal Zone Code 143 and 144)		1,101
Vessel Employees (5 USC 5348)		4,878
Bonneville Power Administration (Bonneville Project Act, as amended)		[5] 1,100

See footnote at end of table.

Alaska Railroad, Operating Personnel (43 USC 975)	[5] 905
Bureau of Engraving and Printing (5 USC 5349)	622
Lighthouse Keepers (14 USC 432(f) and (g))	[2]
Noncitizen wage employees	[2]

[1] Extract of the Civil Service Commission's Central Personnel Data file as of April 30, 1975, unless otherwise specified.

[2] Data not available.

[3] This inventory lists numbers of positions actually occupied and reported. The Executive Schedule covers nearly 700 specific statutory positions, not all of which are occupied, or reported as occupied, at any one time.

[4] President's Budget for fiscal year 1976.

[5] Estimates for fiscal year 1976.

[6] Extract of Civil Service Commission's annual survey, "Salary and Wage Distribution of Federal Civilian Employees," as of March 31, 1974.